Supreme Court, U.S.
FILED
DEC 9 1996
CLERK

(2)

No. 96-560

In the Supreme Court of the United States

OCTOBER TERM, 1996

ROGER RAE BARRICK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether materiality is an element of the offense of making false, fictitious, or fraudulent claims against the United States, in violation of 18 U.S.C. 287.

2. Whether the court of appeals correctly affirmed petitioner's false statements convictions under the plain error rule, Fed. R. Crim. P. 52(b).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1A-42A) is reported at 91 F.3d 677.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 1996. The petition for a writ of certiorari was filed on October 8, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted on two counts of conspiracy to defraud the United States by obtaining and aiding to obtain the payment of a false claim, in violation of 18 U.S.C.

286 (Counts One and Three), on two counts of presenting a false claim against the United States Air Force, in violation of 18 U.S.C. 287 and 2 (Counts Two and Four), and on three counts of making a false statement of material fact to the Air Force, in violation of 18 U.S.C. 1001 and 2 (Counts Five, Six, and Seven).[1] He was sentenced to 63 months' imprisonment, to be followed by three years' supervised release. He was also ordered to pay $1,804,879.99 in restitution. The court of appeals affirmed. Pet. App. 1A-42A.

1. The evidence at trial showed that petitioner, a retired Air Force colonel and practicing lawyer, owned Benefax Surety Corporation (Benefax) and United Fidelity and Trust Company (United Fidelity). Benefax operated as a small surety bond brokerage business. It received finder's fees from construc-

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[1] Petitioner was charged along with several others. Anthony Michael Upton, Santa Barbara Castle Development Corporation, a/k/a Castle Construction, and Benefax Surety Corporation were also charged in Counts One through Four. Benefax and Susan K. Frericks, a/k/a Susan K. Barrick, were also charged in Count Five; Benefax and Roland Aaron Maness were charged along with petitioner in Counts Six and Seven. Count Eight charged Benefax and Maness with presenting a falsely made, forged, or counterfeit writing to the Air Force, in violation of 18 U.S.C. 494 and 2. Pet. App. 10A-11A.

Upton, Benefax, and Castle Construction were convicted along with petitioner; the jury acquitted Maness on all counts. Susan K. Frericks pleaded guilty to a misdemeanor. Petitioner, Upton, and Castle Construction appealed their convictions, and the court of appeals affirmed on all counts, while remanding the sentences of Upton and Castle Construction for recalculation of the restitution amounts. Pet. App. 10A-11A & nn. 5-7. Neither Upton nor Castle Construction joins in this petition.

tion contractors for locating sureties to provide and guarantee the payment and performance bonds that government contractors required. United Fidelity made business loans to contractors who required start-up or mobilization funding. Pet. App. 3A. Petitioner's co-defendant, Anthony Michael Upton, owned a small construction company, Santa Barbara Castle Development Corporation, a/k/a Castle Construction (Castle), which built roofs for small residential and commercial buildings. *Id.* at 4A.

In the summer of 1989, Castle submitted a successful bid on two Air Force contracts for roofing to be done at Vandenburg Air Force Base. After its bid was accepted, Castle was required by law to provide both a performance bond and a payment bond.[2] Castle retained Benefax to provide individual sureties to guarantee the payment and performance bonds. Benefax in turn retained Martin McGuffin and Terry Kinser as individual sureties for the contracts. Pet. App. 6A.

McGuffin and Kinser submitted notarized Affidavits of Individual Surety (AIS) in support of the performance and payment bonds. McGuffin's AIS represented his net worth as $3,782,677, and Kinser's AIS stated a net worth of $7,417,193. Pet. App. 6A. McGuffin admitted at trial that the signature on one of the affidavits was not his. Both affidavits overrepresented McGuffin's net worth. Gov't C.A. Br. 13-14. McGuffin testified that he told petitioner he was having financial difficulties and that the bank would not sign the Certificate of Sufficiency on the back of

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[2] The Miller Act, 40 U.S.C. 270a, requires that all contractors for federal construction contracts provide performance and payment bonds.

the AIS.[3] Petitioner told McGuffin not to worry and then signed the Certificate of Sufficiency as President of United Fidelity. McGuffin signed blank performance and payment bonds, and the information was completed later. Pet. App. 6A-7A.

Kinser testified that his AIS also showed an inflated net worth: petitioner had raised it to $5 million and then to more than $7 million. Based on the information provided by the sureties and guaranteed by the Certificates of Sufficiency, Air Force contract officers approved each AIS. Pet. App. 7A.

Castle issued two checks to Benefax in payment of the bond fees, but asked petitioner not to cash the checks until Castle obtained a bank loan or other financing. Petitioner, through United Fidelity, agreed to lend Castle $100,000 for its mobilization costs, and agreed to wire transfer the loan proceeds before negotiating Castle's checks to Benefax for the bond fees. Petitioner gave Upton paid receipts for the payment and performance bonds and held Castle's checks for those bonds. Pet. App. 7A-8A.

Upton and Castle submitted a request to the government for reimbursement of the bond costs on both contracts, attaching the paid invoices from Benefax. The invoices showed that Benefax had received $27,047.40 and $12,793 from Castle as payment for the bonds on each contract, and that Castle owed nothing on the bonds. The Air Force issued checks reimbursing Castle for the bond costs. Castle never completed the roofing contracts, and the sureties did

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[3] The certificate represents that the signer (here, a bank officer) is aware of the surety's assets and can state that the AIS accurately represents the surety's financial position. Pet. App. 6A n.2; Gov't C.A. Br. 6-7.

not honor their contractual commitments. Pet. App. 9A.

2. At trial, petitioner did not object to the district court's failure, with respect to all counts charging offenses under 18 U.S.C. 287 and 1001, to submit the issue of materiality to the jury. In accordance with circuit precedent, see *United States* v. *Hausmann*, 711 F.2d 615, 617 (5th Cir. 1983), the court decided that issue itself, holding that petitioner's false claims and statements were material as a matter of law. See Pet. 6. On appeal, petitioner argued that this Court's intervening decision in *United States* v. *Gaudin*, 115 S. Ct. 2310 (1995), which requires a jury determination of the issue of materiality in a prosecution under 18 U.S.C. 1001, also applies to prosecutions under 18 U.S.C. 287. Petitioner claimed that, with respect to his convictions under both Section 1001 and Section 287, the district court had committed plain error by failing to submit the issue of materiality to the jury.

The court of appeals held that because the plain language of Section 287 "in no way suggests that materiality is an element of the offense," Pet. App. 26A, it is not such an element, and the district court's failure to submit that issue to the jury was therefore not erroneous. *Id.* at 27A. The court observed that the Second, Ninth, and Tenth Circuits had reached the same conclusion. *Ibid.*; see *United States* v. *Taylor*, 66 F.3d 254, 255 (9th Cir. 1995), petition for cert. pending, No. 95-8279 (filed Mar. 15, 1996); *United States* v. *Parsons*, 967 F.2d 452, 455 (10th Cir. 1992); *United States* v. *Elkin*, 731 F.2d 1005, 1009 (2d Cir.), cert. denied, 469 U.S. 822 (1984).

The court of appeals then turned to petitioner's claim that the district court committed plain error by failing to submit the materiality issue to the jury on

the Section 1001 counts. Following *United States* v. *Olano*, 507 U.S. 725 (1993), the court of appeals observed that, before a court may grant relief to a defendant under plain error review, it must find that an error was committed, that it was plain, clear or obvious, that it affected the defendant's substantial rights, and—under the "discretionary" prong of the *Olano* analysis—that it "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." Pet. App. 29A (internal quotation marks omitted). In this case, the court of appeals concluded that, even if petitioner could meet the first three requirements for a finding of plain error, the *Gaudin* error did not "affect[] the fairness, integrity, or public reputation of these judicial proceedings" and therefore did not warrant reversal. *Id.* at 30A.

DISCUSSION

1. Petitioner claims (Pet. 7-13) that materiality is an element of a false claims offense under 18 U.S.C. 287 and that the district court committed plain error by failing to submit that element to the jury. Although we believe that the holding of the court of appeals—that materiality is not an element of Section 287—is correct, the Court should hold the petition pending its decision in *United States* v. *Wells*, No. 95-1228 (argued Nov. 4, 1996).

Section 287 makes it a crime to submit a claim on or against a government agency "knowing such claim to be false, fictitious, or fraudulent." 18 U.S.C. 287. The jury instructions in this case required the jury, in order to convict petitioner on the Section 287 counts, to find beyond a reasonable doubt that petitioner "knowingly presented to an agency of the United States a false or fraudulent claim against the United

States," and that petitioner "knew the claim was false or fraudulent at the time of presentation." C.A. R.E. 94.

Because the text of Section 287 contains no reference to a materiality element, the district court was correct not to instruct the jury that, to convict, it must further find that petitioner's claims were materially false. The court of appeals was likewise correct in upholding petitioner's conviction on the Section 287 counts. As this Court has emphasized, "[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Staples* v. *United States*, 511 U.S. 600, 604 (1994) (quoting *Liparota* v. *United States*, 471 U.S. 419, 424 (1985)); see *McMillan* v. *Pennsylvania*, 477 U.S. 79, 85 (1986) ("[I]n determining what facts must be proved beyond a reasonable doubt the * * * legislature's definition of the elements of the offense is usually dispositive.").

The Fifth Circuit's holding on this point is consistent with the decisions of the Second and Tenth Circuits. See *United States* v. *Elkin*, 731 F.2d 1005, 1009-1010 (2d Cir.) ("language of § 287 in no way suggests that materiality is an element of the offense"), cert. denied, 469 U.S. 822 (1984); *United States* v. *Irwin*, 654 F.2d 671, 682 (10th Cir. 1981) (statutory language and legislative history of Section 287 do not indicate that Congress intended that materiality be an element of the offense), cert. denied, 455 U.S. 1016 (1982). Petitioner argues (Pet. 7), however, that that holding conflicts with decisions of the Fourth and Eighth Circuits. Although there is language in Fourth and Eighth Circuit cases to the effect that materiality is an element of a Section 287 offense,

those statements were not necessary to the holdings of those cases, and we are unaware of any case in which a court of appeals has reversed a conviction under Section 287 on materiality grounds.

Petitioner relies on *United States* v. *Snider*, 502 F.2d 645 (1974), in which, in a footnote, the Fourth Circuit cited with approval a district court decision in a separate case holding that materiality is an element of Section 287. See 502 F.2d at 652 n.12. *Snider*, however, involved a prosecution under 26 U.S.C. 7205 (which proscribes willfully supplying false or fraudulent information to an employer regarding tax withholding), not Section 287. Petitioner also relies on the Eighth Circuit's decision in *United States* v. *Wells*, 63 F.3d 745 (1995), cert. granted, 116 S. Ct. 1540 (1996), but that case involves a prosecution under a different statute as well: 18 U.S.C. 1014, which proscribes knowingly making a false statement to a federally insured bank for the purpose of influencing the actions of that bank. The Eighth Circuit's statement in *Wells* that materiality is an element of Section 287, see 63 F.3d at 750, was therefore dictum.

Petitioner also relies on an earlier Eighth Circuit case, *United States* v. *Adler*, 623 F.2d 1287 (1980), that did involve a false claim prosecution brought under Section 287. In *Adler*, however, the parties had not addressed whether materiality was in fact an element of Section 287, and the court accordingly stated that it would "treat materiality as an essential element." 623 F.2d at 1291 n.5. The court affirmed the defendant's convictions, however, on the ground that the false claims in that case were material. *Id.* at 1291-1292. The court's treatment of the broader legal question—whether materiality is in fact an element

of an offense under Section 287—was therefore unnecessary to the court's holding.

In sum, there is no clear conflict among the circuits on the question presented here, and this Court's review is not now warranted to resolve the issue. The Court may wish to hold this petition, however, pending its decision in *United States* v. *Wells*, No. 95-1228 (argued Nov. 4, 1996), which, as noted above, presents the question whether materiality is an element of 18 U.S.C. 1014. The text of Section 1014, like the text of 18 U.S.C. 287, contains no reference to a materiality element, and the Court's decision in *Wells* could therefore bear on the issue whether a materiality element is to be imputed to Section 287.[4]

2. Petitioner also challenges (Pet. 8-9, 13-17) the court of appeals' refusal to reverse his conviction because the district court failed to submit the issue of materiality to the jury on the Section 1001 counts. He asserts a conflict among the circuits on the question whether a *Gaudin* error is subject to plain- or harmless-error review under Fed. R. Crim. P. 52 or whether it instead constitutes "structural" error, which is normally reversible per se. Because the question of the proper standard of review for *Gaudin* errors to which no objection was made at trial is

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[4] The question whether materiality is an element of Section 1014 does not necessarily control the question whether materiality is an element of Section 287, because the two statutes contain different language. Indeed, while the Ninth Circuit has held that materiality is not an element of Section 287, *United States* v. *Taylor*, 66 F.3d 254, 255 (1995), petition for cert. pending, No. 95-8279 (filed Mar. 15, 1996), it has held that materiality is an element of Section 1014, see *United States* v. *Nash*, 76 F.3d 282, 284 (1996).

before this Court in *Johnson* v. *United States*, cert. granted, No. 96-203 (Nov. 15, 1996), the Court should hold this petition pending its decision in *Johnson*.[5]

CONCLUSION

The petition for a writ of certiorari should be held, as to Question 1, pending this Court's decision in *United States* v. *Wells*, No. 95-1228, and, as to Question 2, pending the Court's decision in *Johnson* v. *United States*, No. 96-203, and then disposed of accordingly.

Respectfully submitted.

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DECEMBER 1996

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[5] Petitioner also asserts a circuit conflict on a separate question: whether materiality is an element of all offenses charged under Section 1001. See Pet. 12. Because the court of appeals acted on the premise that materiality is an element of petitioner's Section 1001 offenses, however, that issue is not properly presented in this petition. In any event, there is no conflict on that issue. The Second Circuit, the only court of appeals that petitioner notes had held that materiality is not an element of some offenses under Section 1001, has recently joined the other circuits in holding that materiality is an element of all offenses under Section 1001. See *United States* v. *Ali*, 68 F.3d 1468, 1474-1475 (1995).